

JEFFREY M. VUCINICH, ESQ. BAR#: 67906
JOSHUA W. ROSE, ESQ. BAR#: 191024
CLAPP, MORONEY, BELLAGAMBA and VUCINICH
A PROFESSIONAL CORPORATION
1111 Bayhill Drive, Suite 300
San Bruno, CA 94066
(650) 989-5400 (650) 989-5499 FAX

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APR 17 2007

RYAN & LIFTER

Attorneys for Defendant/Cross-Complainant/Cross-Defendant
PAULEY CONSTRUCTION, INC.

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

SIFA TUIAKI and LUPE TUIAKI,

Plaintiffs,

v.

PACIFIC GAS AND ELECTRIC
COMPANY, PAULEY
CONSTRUCTION, INC., TRAFFIC
SOLUTIONS, INC., ADELPHIA
TELECOMMUNICATIONS CO., INC.,
SBC TELECOMMUNICATIONS, INC.,
MOBILE TOOL INTERNATIONAL, INC.
dba TELSTA, COUNTY OF
MENDOCINO, STATE OF
CALIFORNIA, PACIFIC BELL
TELEPHONE COMPANY, PACIFIC
TELESIS GROUP, SBC OPERATIONS,
INC., and DOES 1 to 50,

Defendants.

CASE NO.: CGC-03-419761 (Consolidated
with 04-432476)

**NOTICE OF HEARING ON
DEMURRER OF PAULEY
CONSTRUCTION, INC.**

Cross-Complaint Filed: 11/2/05
Amended Cross-Complaint Filed: 2/22/07
2nd Amended Cross-Complaint Filed: 4/11/07

Date: May 14, 2007
Time: 9:30 a.m.
Department: 301

DPD due - 5-1-07

TO ALL PARTIES HEREIN AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on May 14, 2007, at 9:30 a.m. or soon thereafter as the matter can be heard in Department 301 of the above-noted Court, located at 400 McAllister Street, San Francisco, California 94102, the Court will hear Cross-defendant PAULEY CONSTRUCTION INC'S. demurrer to Cross-complainant ADELPHIA COMMUNICATIONS CORPORATION'S

1 Second Amended Cross-complaint. This demurrer will be made on the grounds that under the
2 California Code of Civil Procedure, sections 430.10(e), 430.10(f): the Second Amended Cross-
3 complaint fails to state facts sufficient to constitute a cause of action against the demurring Cross-
4 defendant; is vague, ambiguous, and uncertain under Code of Civil Procedure Section 430.10(f) in that
5 it cannot be determined therefrom how Cross-defendant could be liable to Cross-complainant; fails
6 to adequately plead the relevant contract claims against Cross-defendant; and are barred under
7 California Code of Civil Procedure § 877.6(c). The demurrer is based upon this Notice, the
8 Demurrer, Memorandum of Points and Authorities and Request for Judicial Notice served and filed
9 herewith, and any other written or oral argument or evidence that may be presented at the hearing on
10 this demurrer.

11
12 DATED: April 16, 2007

CLAPP, MORONEY, BELLAGAMBA
and VUCINICH

13
14
15 By: 

16 JEFFREY M. VUCINICH
17 JOSHUA W. ROSE
18 Attorneys for Defendant/Cross-Complainant/
19 Cross-Defendant
20 PAULEY CONSTRUCTION, INC.
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Defendants.

CASE NO.: CGC-03-419761 (Consolidated
with 04-432476)

**DEMURRER OF CROSS-DEFENDANT
PAULEY CONSTRUCTION, INC. TO
SECOND AMENDED CROSS-
COMPLAINANT BY ADELPHIA
COMMUNICATIONS CORPORATION**

Cross-Complaint Filed: 11/2/05
Amended Cross-Complaint Filed: 2/22/07
2nd Amended Cross-Complaint Filed: 4/11/07

Date: May 14, 2007
Time: 9:30 a.m.
Department: 301

Cross-defendant PAULEY CONSTRUCTION, INC. ("Pauley") demurs to the following
causes of action alleged against it in Cross-complainant **ADELPHIA COMMUNICATIONS
CORPORATION'S** ("Adelphia") Second Amended Cross-complaint on the following grounds:

Demurrer to First Cause of Action against Pauley (Breach of Contract - Full Performance):

1 1. The First Cause of Action to the Second Amended Cross-complaint fails to state facts
2 sufficient to constitute a cause of action against Pauley. (C.C.P. §430.10(e)).

3 2. The First Cause of Action to the Second Amended Cross-complaint is vague,
4 ambiguous, and uncertain under Code of Civil Procedure Section 430.10(f) in that it cannot be
5 determined therefrom how Pauley could be liable to Adelphia for breach of contract, since Adelphia
6 materially breached the very contract it seeks to enforce against Pauley.

7 Demurrer to Second Cause of Action against Pauley (Breach of Contract - Waiver):

8 3. The Second Cause of Action to the Second Amended Cross-complaint fails to state
9 facts sufficient to constitute a cause of action against Pauley. (C.C.P. §430.10(e)).

10 4. The Second Cause of Action to the Second Amended Cross-complaint is vague,
11 ambiguous, and uncertain under Code of Civil Procedure Section 430.10(f) in that it cannot be
12 determined therefrom how Pauley could be liable to Adelphia for breach of contract, since Adelphia
13 materially breached the very contract it seeks to enforce against Pauley.

14 Demurrer to Third Cause of Action against Pauley (Unjust Enrichment):

15 5. The Third Cause of Action to the Second Amended Cross-complaint fails to state facts
16 sufficient to constitute a cause of action against Pauley. (C.C.P. §430.10(e)).

17 6. The Third Cause of Action to the Second Amended Cross-complaint is vague,
18 ambiguous, and uncertain under Code of Civil Procedure Section 430.10(f) in that it cannot be
19 determined therefrom how Pauley could be liable to Adelphia for unjust enrichment by failing to
20 defend and indemnify Adelphia, since Adelphia materially breached the very contract it seeks to
21 enforce against Pauley.

22 Demurrer to Fourth Cause of Action against Pauley (Implied Equitable Indemnity):

23 7. The Fourth Cause of Action to the Second Amended Cross-complaint fails to state facts
24 sufficient to constitute a cause of action against Defendant. (C.C.P. §430.10(e)).

25 8. The Fourth Cause of Action to the Second Amended Cross-complaint is vague,
26 ambiguous, and uncertain under Code of Civil Procedure Section 430.10(f) in that it cannot be
27 determined therefrom how Pauley could be liable to Adelphia for implied equitable indemnity, since
28

1 this claim is barred under California Code of Civil Procedure § 877.6 as this Court ruled that Pauley's
2 settlement with Plaintiffs SIFA and LUPE TUIAKI was unopposed and in good faith.

3 Demurrer to Fifth Cause of Action against Defendant (Contribution):

4 9. The Fifth Cause of Action to the Second Amended Cross-complaint fails to state facts
5 sufficient to constitute a cause of action against Pauley. (C.C.P. §430.10(e)).

6 10. The Fifth Cause of Action to the Second Amended Cross-complaint is vague,
7 ambiguous, and uncertain under Code of Civil Procedure Section 430.10(f) in that it cannot be
8 determined therefrom how Pauley could be liable to Adelphia for contribution, since this claim is
9 barred under California Code of Civil Procedure § 877.6 as this Court ruled that Pauley's settlement
10 with Plaintiffs SIFA and LUPE TUIAKI was unopposed and in good faith.

11 Demurrer to Seventh Cause of Action against Pauley (Express Indemnity):

12 11. The Seventh Cause of Action to the Second Amended Cross-complaint fails to state
13 facts sufficient to constitute a cause of action against Pauley. (C.C.P. §430.10(e)).

14 12. The Seventh Cause of Action to the Second Amended Cross-complaint is vague,
15 ambiguous, and uncertain under Code of Civil Procedure Section 430.10(f) in that it cannot be
16 determined therefrom how Pauley could be liable to Adelphia for express indemnity, since Adelphia
17 materially breached the very contract it seeks to enforce against Pauley.

18
19 DATED: April 16, 2007

CLAPP, MORONEY, BELLAGAMBA
and VUCINICH

20
21
22 By: 

JEFFREY M. VUCINICH

JOSHUA W. ROSE

Attorneys for Defendant/Cross-Complainant/
Cross-Defendant

PAULEY CONSTRUCTION, INC.

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SUPERIOR COURT OF CALIFORNIA

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11 SIFA TUIAKI and LUPE TUIAKI,
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16 TELECOMMUNICATIONS CO., INC.,
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dba TELSTA, COUNTY OF
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19 TELEPHONE COMPANY, PACIFIC
TELESIS GROUP, SBC OPERATIONS,
20 INC., and DOES 1 to 50,

21 Defendants.
22
23

CASE NO.: CGC-03-419761 (Consolidated
with 04-432476)

**MEMORANDUM OF POINTS AND
AUTHORITIES OF CROSS-
DEFENDANT PAULEY
CONSTRUCTION, INC. IN SUPPORT
OF DEMURRER TO CROSS-
COMPLAINANT ADELPHIA
COMMUNICATIONS
CORPORATION'S SECOND AMENDED
CROSS-COMPLAINT**

Cross-Complaint Filed: 11/2/05
Amended Cross-Complaint Filed: 2/22/07
2nd Amended Cross-Complaint Filed: 4/11/07

Date: May 14, 2007
Time: 9:30 a.m.
Department: 301

24 Cross-defendant PAULEY CONSTRUCTION, INC. ("Pauley") submits the following
25 Memorandum of Points and Authorities in Support of its demurrer to Cross-complainant ADELPHIA
26 COMMUNICATIONS CORPORATION'S ("Adelphia") Second Amended Cross-complaint.
27

1 **I. INTRODUCTION & PROCEDURAL POSTURE**

2 On July 7, 2000, Pauley contracted with project owner Century Mendocino Cable TV d/b/a
3 Adelphia Cable Communications to install and upgrade cable facilities on the Fort Bragg Project in
4 Mendocino County.

5 On November 2, 2001, Plaintiff Sifa Tuiaki's employer, S.G. Barber Construction, Inc.,
6 subcontracted with general contractor, Pauley, pursuant to Pauley's contract with Adelphia, to perform
7 the actual aerial cable construction work.

8 On May 1, 2002, Mr. Tuiaki was seriously injured when he came into contact with an elevated
9 electrical power line while operating a bucket truck. At the time of his accident, Mr. Tuiaki was a line
10 crew foreman employed by S.G. Barber.

11 On June 25, 2002, Adelphia filed for voluntary Chapter 11 Bankruptcy in the United States
12 Bankruptcy Court, Southern District of New York. Adelphia never assumed the Pauley - Adelphia
13 contract that is the basis of Adelphia's Amended Cross-complaint, thus the contract is deemed rejected
14 and breached by Adelphia immediately before the bankruptcy filing. Adelphia pleads that it still owes
15 Pauley over \$4.2 million.

16 On September 19, 2006, Plaintiff Mr. Tuiaki and his wife, Plaintiff Lupe Tuiaki, filed their
17 Second Amended Complaint for personal injury and loss of consortium against various defendants.
18 Three causes of action in this form complaint name Pauley: the second for premises liability; the third
19 cause of action for general negligence; and the fifth cause of action for Mrs. Tuiaki's loss of
20 consortium. In addition, Plaintiffs raised a punitive damages claim against Pauley.

21 On November 2, 2005, Adelphia filed a Cross-complaint against Pauley raising causes of
22 action for implied equitable indemnity, contribution, declaratory relief, breach of contract and express
23 indemnity.

24 On August 1, 2006, this Court denied Adelphia's Motion for Summary Adjudication seeking
25 to compel Pauley to defend and indemnify it pursuant to the terms of the July 7, 2000 contract. This
26 Court denied Adelphia's motion on the grounds that there were sufficient questions of fact regarding
27

1 Adelpia's active negligence to put into question Pauley's indemnity obligations. Adelpia filed a
2 writ of mandate seeking appellate review. However, the writ was summarily denied by the Court of
3 Appeals.

4 On January 11, 2007, a settlement was reached between Pauley, S.G. Barber and Plaintiffs.
5 Pauley filed a Motion for Good Faith Settlement, which was unopposed.

6 On February 13, 2007, this Court ~~granted~~ Pauley's Motion for Judgment on the Pleadings
7 against Adelpia's November 2005 Cross-complaint, ruling that Adelpia had failed to plead an
8 essential element of its breach of contract and express indemnity causes of action, namely that it
9 performed its obligations or was excused from performing its obligations under the contract containing
10 the indemnity terms. Adelpia was given 10 days leave to amend.

11 On February 20, 2007, this Court granted Pauley's unopposed motion for good faith settlement
12 confirming the settlement between Pauley, S.G. Barber and Plaintiffs and ruling that any and all actual
13 and/or potential claims by Plaintiffs, Defendants, Cross-complainants, Cross-defendants, and by any
14 other actual or potential party against any of the parties to the settlement by any joint tortfeasor or co-
15 obligor for equitable comparative contribution or partial or comparative indemnity based on
16 comparative negligence or comparative fault are forever barred.

17 On February 22, 2007, Adelpia filed its Amended Cross-complaint against Pauley raising
18 causes of action for breach of contract - substantial performance, breach of contract - waiver, unjust
19 enrichment, implied equitable indemnity, contribution, declaratory relief and express indemnity. This
20 Amended Cross-complaint is the basis of the instant demurrer. This Amended Cross-complaint is the
21 only remaining pleading in this action, an action that has been in litigation for nearly four years.

22 On March 16, 2007, then again on March 26, 2007, Adelpia served, but has not filed, to date,
23 its purported Second Amended Cross-complaint raising causes of action for breach of contract - full
24 performance, breach of contract - waiver, unjust enrichment, implied equitable indemnity,
25 contribution, declaratory relief and express indemnity. Adelpia's attorney, David Kleczek, refused
26 to dismiss the Amended Cross-complaint in lieu of the Second Amended Cross-complaint, which he
27

has not even filed. Thus, Pauley was forced to demur to the Amended Cross-complaint, with a hearing date of April 26, 2007, as well as a demurrer to Adelphia's Second Amended Cross-complaint, as it does not want any pleadings floating around without an appropriate responsive pleading. (See March 23, 2007 letter to Adelphia and Adelphia's March 23, 2007 response thereto, attached hereto.) The Court should use its authority to put an end to this lawsuit as Adelphia has no viable basis in law or fact to support its second amended pleading.

II. ALLEGATIONS IN ADELPHIA'S SECOND AMENDED CROSS-COMPLAINT

Based principally on the facts that (1) Adelphia filed bankruptcy, (2) that it pleads, acknowledges and agrees that it owed Pauley in excess of \$4.2 million, (3) that Adelphia has never assumed the contract, thus it is deemed rejected, pursuant to the Bankruptcy Code and (4) that Pauley's only alternative, if it wanted to get paid partially for the breach of contract by Adelphia, was to file a claim in Bankruptcy Court, makes Adelphia a materially breaching party who cannot sue for breach of contract.

The only material facts that warrant the Court's attention are as follows. On or about July 7, 2000, Adelphia and Pauley entered into a written contract whereby Pauley was to act as the general contractor in connection with the upgrade/installation of cable television facilities in Mendocino County. (Second Amended Cross-complaint (SACC) at ¶3, lines 14-17.) On June 25, 2002, Adelphia filed for voluntary Chapter 11 Bankruptcy in the United States Bankruptcy Court, Southern District of New York. (SACC at ¶9, lines 4-5.) At the time of the bankruptcy filing, Adelphia owed Pauley \$4,251,595.08. Because Adelphia did not assume the contract, Pauley submitted a claim to the Bankruptcy Court, which was its only recourse against the bankrupt party who rejected the contract. (SACC at ¶10, lines 6-10.) Finally, that if Pauley's bankruptcy claim has been satisfied, it is by operation of bankruptcy law, not because Adelphia performed under the contract. (SACC at ¶15, lines 1-2 and ¶16, lines 3-4.)

It is simply unfathomable how Adelphia can, on one hand, file bankruptcy, thus rejecting and breaching the contract, while pleading and admitting that it owes/owed Pauley over \$4.2 million,

1 which had been due and owing since before June 2002, and never paid by Adelphia pursuant to
 2 contract, but instead, if at all, by operation of Bankruptcy law, then, on the other hand, claim that it
 3 is entitled to defense and indemnity from Pauley under the very contract that it refused to assume.
 4 Adelphia is guilty of unclean hands and the Court should put an end to this by granting Pauley's
 5 demurrer without leave to amend. Based on basic principles of bankruptcy law and state contract law,
 6 it is patently unjust, unreasonable and contrary to law to allow Adelphia's claims to survive. This is
 7 a classic situation of unclean hands by Adelphia.

8 The genesis of the unclean hands defense is the maxim, "He who comes into equity must come
 9 in with clean hands." This principle mandates that a plaintiff must have acted fairly in the matter in
 10 which he or she seeks relief-or be denied relief, regardless of the merit of the underlying claim. The
 11 purpose of the defense is not to protect the defendant's interests but rather the court's integrity. It does
 12 so by denying redress to a plaintiff who has unclean hands, thereby instilling trust in the judicial
 13 system. The defense also is justified as promoting justice by making a plaintiff answer for his or her
 14 misconduct. (*Kendall-Jackson Winery, Ltd. v. Superior Court* (1999) 76 Cal. App. 4th 970 at 978.)
 15 The unclean hands defense may be applied to legal as well as equitable claims and to both tort and
 16 contract claims (*Camp v. Jeffer, Mangels, Butler & Marmaro* (1995) 35 Cal. App. 4th 620 at 628),
 17 but it does not automatically apply to every claim thrown at a defendant. Defendants have
 18 successfully applied the defense at the trial court level via demurrer to the complaint. (*Blain v.*
 19 *Doctor's Co.* (1990) 222 Cal. App. 3d 1048.) Here, Adelphia is guilty of unclean hands by materially
 20 breaching the construction contract it had with Pauley, then attempting to enforce some of the terms
 21 (alleged insurance, defense and indemnity obligations) contained within the very contract that it
 22 breached. The misconduct "must relate directly to the transaction concerning which the complaint is
 23 made, i.e., it must pertain to the very subject matter involved and affect the equitable relations between
 24 the litigants." (*Fibreboard Prod. Corp. v. East Bay Union of Machinists*, (1964) 227 Cal. App. 2d 675
 25 at 728.) Here, Adelphia's misconduct, its rejection of, thus breach of the contract with Pauley, is the
 26 very subject matter of the Second Amended Cross-complaint, which seeks to enforce some of the
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1 contractual terms against Pauley.

2 First Cause of Action Breach of Contract - Full Performance

3 Adelphia claims that it fully performed its obligations under the contract by making payments
4 between July 2000 and November 14, 2001 and by paying in full Pauley's claim. (SACC ¶20, line
5 21-23.) This is simply a misstatement of law. Adelphia, only by operation of Bankruptcy law and
6 because of the Bankruptcy Court's approval, allegedly satisfied Pauley's claim. In addition, it claims
7 that Pauley has breached the contract by failing to defend and indemnify it. (SACC at ¶24, lines 26-
8 27; 1-2; ¶25, lines 3-7.)

9 Second Cause of Action Breach of Contract - Waiver

10 Adelphia claims that Pauley had knowledge of Adelphia's financial problems, yet continued
11 to perform under the contract. (SACC at ¶27, lines 13-15; ¶28, lines 16-19.) It further claims that by
12 refusing to defend and indemnify Adelphia, Pauley breached the contract. (SACC at ¶36, lines 6-9.)
13 This of course ignores basic Bankruptcy Law which states that the bankrupt party must either assume
14 (and perform) the contract or reject the contract, which is deemed a material breach.

15 Third Cause of Action Unjust Enrichment

16 Adelphia argues that in the contract, Pauley is required to defend and indemnify it. (SACC
17 at ¶39, lines 19-22.) It further argues that it has fully performed its obligations under the contract.
18 (SACC at ¶40, line 23.) It goes to claim that Pauley has been unjustly enriched to the detriment of
19 Adelphia. (SACC at ¶45, lines 6-10.)

20 Fourth Cause of Action Implied Equitable Indemnity

21 Adelphia claims that it is entitled to implied equitable indemnity from Pauley in the event that
22 Adelphia is held jointly liable with other parties to the action and is required to pay damages to other
23 parties in the action. (SACC at ¶47, lines 15-23.)

24 Fifth Cause of Action Contribution

25 Adelphia claims that it is entitled to contribution from Pauley in the event that Adelphia is held
26 jointly liable with other parties to the action and is required to pay damages to other parties in the
27

1 action. (SACC at ¶50, lines 7-12.)

2 Seventh Cause of Action Express Indemnity

3 Adelphia claims that contract contains an express indemnity provision which provides that
4 Pauley will indemnify and hold harmless Adelphia. It further claims that Pauley owes it express
5 indemnity because Pauley refused to pick up its tender of defense and indemnity. (SACC at ¶55, lines
6 6-15.)

7 Summary of Adelphia's Second Amended Cross-complaint

8 The causes of action asserted by Adelphia against Pauley first, fail to state facts sufficient to
9 constitute a cause of action, and second, cannot be understood because they are uncertain. Each of
10 Adelphia's claims are based on a skewed interpretation of the facts and the law. Either Adelphia's
11 causes of action are missing elements, or they are barred by California Code of Civil Procedure §
12 877.6(c). Thus, Pauley's demurrer to each and every cause of action set forth in the Second Amended
13 Cross-complaint, except for cause of action 6, for declaratory relief, should be sustained without leave
14 to amend.

15 III. LEGAL ARGUMENT

16 A general demurrer will lie where the complainant fails to state facts sufficient to constitute
17 a cause of action. Code of Civil Procedure § 430.10(e).) A general demurrer will also lie where the
18 complaint is so uncertain, ambiguous or unintelligible that the responding party cannot determine what
19 is being alleged against it. (Code of Civil Procedure § 430.10(f).) Because this case comes before the
20 Court on demurrer, the Court is to accept as true the complaint's **well-pleaded material facts** and
21 examine those factual allegations to ascertain if they state a cause of action on any legal theory. (*AL*
22 *Holding Co. v. O'Brien & Hicks, Inc.* (1999) 75 Cal.App.4th 1310, 1312. *Emphasis added.*) The
23 material facts at issue here are that: Adelphia and Pauley had an executory contract at the time
24 Adelphia filed for Chapter 11 Bankruptcy; Adelphia does not allege that the \$4.2 million was not due
25 and owing; Adelphia does not allege that it assumed the contract; and Adelphia owed Pauley over \$4.2
26 million, which was allegedly satisfied only by way of operation of Bankruptcy Law and approval by
27

the Bankruptcy Court, not because Adelphia assumed the contract.

A. ADELPHIA'S FIRST, SECOND, THIRD AND SEVENTH CAUSES OF ACTION FAIL BECAUSE ADELPHIA FAILED TO PLEAD THE CAUSES OF ACTION AGAINST PAULEY AND THE CAUSES OF ACTION ARE UNCERTAIN

First Cause of Action Breach of Contract - Performance

This cause of action fails to state facts sufficient to constitute a cause of action. In addition, it is uncertain. (C.C.P. § 430.10(e), (f).)

Claimed performance by Adelphia does not negate the fact that it materially breached the contract by filing bankruptcy, then refusing to assume, therefore rejecting the contract. Adelphia has failed to adequately plead an essential element of its breach of contract claim, namely, that it performed or is excused from performing. The Bankruptcy Court, not Adelphia, allowed for the satisfaction of Pauley's claim, by operation of Bankruptcy Law, not state contract law. In addition, based on the above, the first cause of action is uncertain, ambiguous and unintelligible.

Plaintiff must plead and prove the following essential elements to establish a cause of action for damages for breach of contract: (1) the contract; (2) plaintiff's performance or excuse for nonperformance; (3) defendant's breach; and (4) resulting damage to plaintiff. (*Reichert v. General Ins. Co.* (1968) 68 Cal.2d 822, 830; *Lortz v. Connell* (1969) 273 Cal.App.2d 286, 290 (plaintiff's complaint fails to indicate either that plaintiff performed all that he was obligated to perform prior to that date, or that defendants had prevented him from rendering such performance); *Otworth v. Southern Pac. Transportation Co.* (1985) 166 Cal.App.3d 452, 459 (trial court properly sustained the Southern Pacific's demurrer as to the contract cause of action since Otworth's complaint includes no assertion that Otworth has either performed the contract or is excused from performing); *Walsh v. West Valley Mission Community College Dist.* (1998) 66 Cal.App.4th 1532, 1545.)) The plaintiff must prove ability to perform. (*Ersa Grae Corp. v. Fluor Corp.* (1991) 1 Cal.App.4th 613, 625.) Moreover, Adelphia did not substantially perform. At the time of its bankruptcy filing, in June 2002, it owed Pauley over \$4.2 million. The doctrine of substantial performance is available only when the

omissions or deviations from full performance are the result of mistake or inadvertence, not when the omissions or deviations are intentional. (*Perry v. Quackenbush* (1894) 105 Cal. 299, 309-310; *Shell v. Schmidt* (1958) 164 Cal.App.2d 350, 365-366.)

Here, to state a cause of action for breach of contract, Adelphia must plead the contract, its performance of the contract or excuse for nonperformance, Pauley's breach and the resulting damage. However, on its face, Adelphia's Second Amended Cross-complaint fails to state a cause of action for breach of contract. Adelphia's assertion that it has fully performed is negated by ¶9, lines 4-5; ¶10, lines 6-10, whereby it clearly admits that it filed for Bankruptcy and owed Pauley over \$4.2 million for work that Pauley performed under the contract between November 15, 2001 and July 16, 2002.

Because the Bankruptcy Court (not Adelphia) finally authorized payment of Pauley's claim does not change the fact that Adelphia rejected, thus materially breached the subject contract. The material breach of the contract by Adelphia, i.e. by failing to pay Pauley over \$4.2 million in progress payments under the executory construction contract, precludes Adelphia from seeking to enforce the terms of the contract against Pauley now. To repeat, Adelphia did not satisfy Pauley's claim because it wanted to perform its obligations under the contract, instead, the Bankruptcy Court authorized payment of the claim by operation of Bankruptcy Law. The clear fact exists – Adelphia breached the contract by filing Bankruptcy, then refusing to assume it.

Significantly, Adelphia rejected the July 7, 2000 executory contract it had with Pauley, thus the bankruptcy estate lost any benefits it had under the contract, and is liable for all damages caused by the rejection, which is considered a material breach of contract. Rejection is the functional equivalent of abandonment of the right to compel the contracting party's performance for want of benefit to the estate. (*In Re Miller*, 103 B.R. 353, 354 (Bankr. D.D.C.1989).)

Rejection does not cause the contract to "disappear," for the contracting party (Pauley), will have a claim against the estate, subject to certain restrictions, for the value of the debtor's performance under the now-breached contract. Under rejection, both the trustee (or debtor in possession) and the contracting party are excused from further performance under the contract. (11 U.S.C. §§365g, 502g.)

1 Rejection is intended to (1) guard the estate against elevating contract obligations; and (2) treat the
 2 claim arising from the Rejection as a pre-petition, unsecured claim. Rejection of a contract is deemed
 3 a breach by the debtor immediately before the commencement of the case, which gives rise to a pre-
 4 petition claim for the debtor's failure to perform under the contract. (11 U.S.C. § 365g, 502g.) The
 5 remedies available to the contracting party upon a breach are those available under applicable state
 6 law.

7 Therefore, Pauley's alleged contractual obligations to defend and indemnify Adelphia ceased
 8 immediately before Adelphia's June 25, 2002 bankruptcy filing. The inherent problem with
 9 Adelphia's Second Amended Cross-complaint is that under basic state law contractual principles, a
 10 breaching party (i.e. one who fails to pay) cannot sue on the very contract under which it has not
 11 performed all of its own obligations. Therefore, Adelphia cannot enforce Pauley's obligations, if any,
 12 since Adelphia has not performed the conditions precedent imposed on it. (Civ. Code § 1439.)
 13 Moreover, Adelphia's failure to make progress payments under a building contract constituted failure
 14 of consideration justifying rescission by Pauley. (*American-Hawaiian Engineer and Construction Co.*
 15 *v. Butler* (1913) 165 Cal. 497, 516.) Finally, under standard contract law principles, a party who has
 16 breached a contract without justification or excuse may not enforce the contract. "To state a cause of
 17 action for breach of contract, [a party] must plead the contract, his performance of the contract or
 18 excuse for nonperformance, [the other party's] breach and the resulting damage." (*Fairchild v. Park*
 19 (2001) 90 Cal.App.4th 919, 934, citing (*Otworth v. Southern Pac. Transportation Co.* (1985) 166
 20 Cal.App.3d 452, 458.) Thus, not only has Adelphia failed to state facts sufficient to constitute this
 21 cause of action, but the cause of action is uncertain, thus Pauley's demurrer to this cause of action
 22 should be granted without leave to amend.

23 Second Cause of Action Breach of Contract - Waiver

24 This cause of action fails to state facts sufficient to constitute a cause of action. In addition,
 25 it is uncertain. (C.C.P. § 430.10(e), (f).)
 26
 27

As stated in the analysis immediately above, but not repeated here, to state a cause of action for breach of contract, Adelphia must plead the contract, its performance of the contract or excuse for nonperformance, Pauley's breach and the resulting damage. However, on its face, nowhere in ¶¶26-37 does Adelphia state that it has performed. Adelphia asks the Court here to make a finding that it performed under the contract because Pauley's claim was eventually allowed by the Bankruptcy Court. This is not supported by the facts or law. In reality, the Bankruptcy Court has compelled the Bankruptcy estate to satisfy Pauley's claim by operation of Bankruptcy law. Had Adelphia truly wanted to perform its obligations under the contract with Pauley, so as to take advantage of terms that were advantageous to it, it would have assumed the contract and both Pauley and Adelphia would have been bound by those terms. However, Adelphia rejected the contract, so both the trustee (or debtor in possession) and the contracting party are excused from further performance under the contract. (11 U.S.C. §§365g, 502g.) Not only has Adelphia failed to state facts sufficient to constitute this cause of action, but the cause of action is uncertain. Therefore, Pauley's demurrer to this cause of action should be granted without leave to amend.

Third Cause of Action Unjust Enrichment

This cause of action fails to state facts sufficient to constitute a cause of action. In addition, it is uncertain. (C.C.P. § 430.10(e), (f).)

A claim is a right to payment or a right to an equitable remedy for a failure of performance if the breach gives rise to a right to payment. 11 U.S.C. § 101(5). By filing Pauley's proof of claim, even if the claim was eventually satisfied, does not mean that the bankrupt party, Adelphia, has performed under the contract. An executory contract that is not assumed by Adelphia during the bankruptcy process is deemed rejected, thus breached.

A person is enriched if he receives a benefit at another's expense. The fact that one person benefits another is not, by itself, sufficient to require restitution. The person receiving the benefit is required to make restitution only if the circumstances are such that, as between the two individuals,

1 it is unjust for the person to retain it. (*First Nationwide Savings v. Perry* (1992) 11 Cal.App.4th 1657,
 2 1662-1663; *California Medical Assn. v. Aetna U.S. Healthcare of California, Inc.* (2001) 94
 3 Cal.App.4th 151, 172; Rest., Restitution, § 1, com. c.)

4 Here, Adelphia's Second Amended pleading at ¶¶38-45 fails to state a cause of action for
 5 unjust enrichment. There are no facts pled therein that support a finding that Pauley has received any
 6 portion of the \$4.2 million because Adelphia assumed the contract. Nor has Adelphia stated facts
 7 establishing that Pauley has been unjustly enriched. Adelphia received the benefit of Pauley's
 8 construction services, but failed to pay over \$4.2 million. Only after being compelled by the
 9 Bankruptcy Court to satisfy Pauley's claim did Adelphia's estate act. Pauley has absolutely no
 10 present, ongoing obligations under the contract, since it was rejected/breached by Adelphia. As such,
 11 Pauley's only avenue to seek reimbursement of over \$4.2 million for construction services that it
 12 performed was to file a proof of claim in Bankruptcy Court. It could not sue Adelphia for breach,
 13 because Adelphia is insulated from such lawsuits while in Bankruptcy. Therefore, Adelphia, not
 14 Pauley was unjustly enriched. Adelphia received all of the benefits of Pauley's construction services,
 15 while it was able to withhold payments for that work for nearly five years. It was only compelled to
 16 satisfy the claim after the Bankruptcy Court made such an order.

17 When one party has been injured by a breach of contract and she either lacks the ability or the
 18 desire to keep the contract alive, she can choose between two different remedies. She can treat the
 19 contract as rescinded and recover damages resulting from the rescission. Or she can treat the contract
 20 as repudiated by the other party and recover damages to which she would have been entitled had the
 21 other party not breached the contract or prevented her performance. An action for rescission is based
 22 on the disaffirmance of the contract and an action for damages for breach of contract is based on its
 23 affirmance. (*Akin v. Certain Underwriters at Lloyd's London* (2006) 140 Cal. App. 4th 291, 296.)
 24 Accordingly, because Akin sought to retain the benefits of the contract (*i.e.*, payment of benefits under
 25 the policies), rather than rescission damages (return of her premiums), the Court held that her cause
 26 of action for rescission was really a breach of contract claim and that she was not entitled to damages
 27

1 under Cal Civ Code § 1692. (*Id.* at 288.)

2 It is incredulous for Adelphia to allege that Pauley was in any way unjustly enriched here.
3 Adelphia has failed to evidence that its reimbursement of over \$4.2 million to Pauley was for any
4 other reason, except by operation of Bankruptcy Law, after being compelled by the Bankruptcy Court
5 to do so. Adelphia alleges that Pauley has been compensated for work performed, thus Pauley owes
6 it indemnity under the contract. (SACC at ¶¶15, 16, lines 1-4, ¶24, lines 26-27; ¶34, lines 25-28; ¶36,
7 lines 6-9.) However, this ignores the rejection of, thus the material breach of the contract by Adelphia.
8 This rejection and breach by Adelphia completely severs any obligations by Pauley under the contract,
9 including an alleged obligation to indemnify Adelphia. The unjust enrichment claim is simply another
10 way of arguing that Pauley breached the contract. This claim fails.

11 As stated above, Adelphia had two choices when it filed bankruptcy, one, assume the contract,
12 whereby both parties would perform fully, or two, reject the contract, thus breaching it. It chose the
13 latter, thus giving Pauley only one option if it wanted to be paid for work performed – to file a proof
14 of claim in the Bankruptcy Court for money owed, which Pauley did. Again, this cause of action is
15 simply another way of saying that Pauley breached the contract. Adelphia has failed to adequately
16 plead an essential element of its unjust enrichment claim, which is really a claim for breach, namely,
17 that it performed or is excused from performing. Not only has Adelphia failed to state facts sufficient
18 to constitute this cause of action, but the cause of action is uncertain. Therefore, Pauley's demurrer
19 to this cause of action should be granted without leave to amend.

20 Seventh Cause of Action Express Indemnity

21 This cause of action fails to state facts sufficient to constitute a cause of action. In addition,
22 it is uncertain. (C.C.P. § 430.10(e), (f).)

23 Adelphia's seventh cause of action is simply another way of restating the breach of contract
24 causes of action above. For the reasons stated above, it also fails. The Second Amended Cross-
25 complaint does not state facts sufficient to constitute an express indemnity cause of action against
26 Pauley. Again, Adelphia has failed to plead an essential element, that it performed its obligations
27

1 under the contract containing the indemnity terms. On its face, nowhere in ¶¶54-55 does Adelphia
 2 state that it has performed. Satisfaction of the \$4.2 million claim was solely by operation of
 3 Bankruptcy Law. Not only has Adelphia failed to state facts sufficient to constitute this cause of
 4 action, but the cause of action is uncertain. Therefore, Pauley's demurrer to this cause of action
 5 should be granted without leave to amend.

6 **B. ADELPHIA'S FOURTH AND FIFTH CAUSES OF ACTION FAIL**
 7 **BECAUSE THEY ARE UNCERTAIN AS THEY ARE BARRED BY**
 8 **CALIFORNIA CODE OF CIVIL PROCEDURE § 877.6(c)**

9 Fourth Cause of Action Implied Equitable Indemnity

10 On February 20, 2007, this Court granted Pauley's unopposed motion for good faith settlement
 11 confirming the settlement between Pauley, S.G. Barber and Plaintiffs and ruling that any and all actual
 12 and/or potential claims by Plaintiffs, Defendants, Cross-complainants, Cross-defendants, and by any
 13 other actual or potential party against any of the parties to the settlement by any joint tortfeasor or co-
 14 obligor for equitable comparative contribution or partial or comparative indemnity based on
 15 comparative negligence or comparative fault are forever barred. Based on the above, the fourth cause
 of action is uncertain, ambiguous and unintelligible.

16 CALIFORNIA CODE OF CIVIL PROCEDURE § 877.6 states:

17 “(c) a determination by the court that the settlement was in good faith shall bar
 18 any other joint tortfeasor or co-obligor from any further claim against the settling
 19 tortfeasor or co-obligor for equitable comparative contribution, or partial or
 comparative indemnity, based on comparative negligence or comparative fault.”

20 A good faith settlement operates to discharge the settling parties from liability to any other
 21 alleged tortfeasor for partial or comparative indemnity or contribution, regardless of whether the other
 22 alleged tortfeasors are presently parties to the plaintiffs' action or have ever been parties to the action.
 23 (CALIFORNIA CODE OF CIVIL PROCEDURE § 877.6, *Mill Valley Refuge Company v. Superior Court*
 24 (1981) 108 Cal.App. 3d 707, *Stambaugh v. Superior Court* (1976) 62 Cal. App. 3d 231.)

25 Therefore, Adelphia's claim for implied equitable indemnity fails as a matter of law. C.C.P.
 26 § 877.6(c) precludes Adelphia, a joint tortfeasor party, from asserting this cause of action against
 27 Pauley, since this Court has ruled that Pauley's settlement with Plaintiffs and S.G. Barber was

unopposed (by Adelpia or any other party) and made in good faith.

Fifth Cause of Action Contribution

For the same reasons stated immediately above, Adelpia's cause of action for contribution is uncertain, because it fails as a matter of law. C.C.P § 877.6(c) precludes Adelpia, a joint tortfeasor party, from asserting this cause of action against Pauley, since this Court has ruled that Pauley's settlement with Plaintiffs and S.G. Barber was unopposed (by Adelpia or any other party) and made in good faith.

IV. CONCLUSION

Based on the foregoing facts and arguments, Pauley respectfully requests that the Court grant its demurrer as to causes of action 1, 2, 3, 4, 5, and 7, without giving Adelpia leave to amend.

DATED: April 16, 2007

CLAPP, MORONEY, BELLAGAMBA
and VUCINICH

By: 

JEFFREY M. VUCINICH
JOSHUA W. ROSE
Attorneys for Defendant/Cross-Complainant/
Cross-Defendant
PAULEY CONSTRUCTION, INC.

March 23, 2007

Reply to: San Bruno
Joshua W. Rose
jrose@clappmoroney.com

VIA FACSIMILE AND U.S. MAIL

Michael J. Daley, Esq.
David A. Kleczek, Esq.
Ryan & Lifter
2010 Crow Canyon Place, Suite 330
San Ramon, CA 94583

Re: *Sifa Tuiaki and Lupe Tuiaki v. Pacific Gas and Electric Company, et al.*
San Francisco Superior Court Case No. CGC-04-419761
Our Client: Pauley Construction
Our File No.: 0017-03419

Dear Mr. Kleczek:

Please allow this letter to serve as confirmation that you intend Adelphia's Second Amended Cross-complaint against Pauley Construction to be your operative pleading, not the Amended Cross-complaint. In that regard, we will file a responsive pleading to the Second Amended Cross-complaint, but not to Adelphia's Amended Cross-complaint. In addition, you are going to file the Second Amended Cross-complaint, which is not on file yet with the Court, while dismissing the Amended Cross-complaint.

If any of this does not comport with your understanding of our conversation yesterday, please advise immediately. Thank you for your attention to the foregoing. If you have any questions, please do not hesitate to contact the undersigned.

Very truly yours,

Joshua W. Rose

Ch 3/23

JOSEPH D. RYAN
JILL J. LIFTER
MICHAEL J. DALEY
BARBARA U. UBEROI
DAVID A. KLECZEK
CHRISTIA MANSWOLT-CHOY

Not a member of the State Bar of California
Not a member of the State Bar of California

LAW OFFICES OF
RYAN & LIFTER
A PROFESSIONAL CORPORATION
2010 CROW CANYON PLACE, SUITE 330
SAN RAMON, CA 94583-1344
TELEPHONE: (925) 884-2080
FAX: (925) 884-2090

March 23, 2007

SENT VIA TELEFAX

Joshua W. Rose, Esq.
Clapp, Moroney, Bellagamba & Vucinich
1111 Bayhill Drive, Suite 300
San Bruno, California 94066

RE: *Sifa Tuiaki, et al. v. Pacific Gas & Electric Company, et al.*
Our File No.: L637

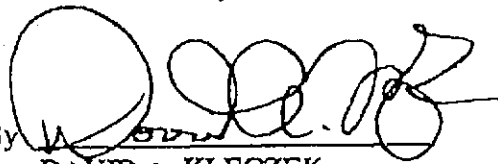
Dear Mr. Rose:

Thank you for your letter of today. I would like to clarify your statement regarding the status of our second amended cross-complaint. I will take steps to ensure that the second amended cross-complaint is filed appropriately. I do not agree that the amended cross-complaint must be dismissed.

However, you are correct that we intend Adelphia's second amended cross-complaint to be the operative pleading. I hope this clarifies things for you.

Very truly yours,

RYAN & LIFTER
A Professional Corporation

By 
DAVID A. KLECZEK

DAK:amd

RECEIVED

APR 17 2007

RYAN & LIFTER

JEFFREY M. VUCINICH, ESQ. BAR#: 67906
JOSHUA W. ROSE, ESQ. BAR#: 191024
CLAPP, MORONEY, BELLAGAMBA and VUCINICH
A PROFESSIONAL CORPORATION
1111 Bayhill Drive, Suite 300
San Bruno, CA 94066
(650) 989-5400 (650) 989-5499 FAX

Attorneys for Defendant/Cross-Complainant/Cross-Defendant
PAULEY CONSTRUCTION, INC.

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

SIFA TUIAKI and LUPE TUIAKI,

Plaintiffs,

v.

PACIFIC GAS AND ELECTRIC
COMPANY, PAULEY
CONSTRUCTION, INC., TRAFFIC
SOLUTIONS, INC., ADELPHIA
TELECOMMUNICATIONS CO., INC.,
SBC TELECOMMUNICATIONS, INC.,
MOBILE TOOL INTERNATIONAL, INC.
dba TELSTA, COUNTY OF
MENDOCINO, STATE OF
CALIFORNIA, PACIFIC BELL
TELEPHONE COMPANY, PACIFIC
TELESIS GROUP, SBC OPERATIONS,
INC., and DOES 1 to 50,

Defendants.

CASE NO.: CGC-03-419761 (Consolidated
with 04-432476)

**[PROPOSED] ORDER GRANTING
DEMURRER OF CROSS-DEFENDANT
PAULEY CONSTRUCTION, INC. TO
CROSS-COMPLAINANT ADELPHIA
COMMUNICATIONS
CORPORATION'S SECOND AMENDED
CROSS-COMPLAINT**

Cross-Complaint Filed: 11/2/05
Amended Cross-Complaint Filed: 2/22/07
2nd Amended Cross-Complaint Filed: 4/11/07

Date: May 14, 2007
Time: 9:30 a.m.
Department: 301

Cross-defendant Pauley Construction, Inc.'s. ("Pauley") Demurrer to Cross-complainant
Adelphia Communications Corporation's ("Adelphia") Second Amended Cross-complaint came on
regularly before the Court at 9:30 a.m. on May 14, 2007, in Department 301 of San Francisco Superior
Court. Clapp, Moroney, Bellagamba & Vucinich appeared on behalf of Pauley. Ryan & Lifter

1 appeared on behalf of Adelphia.

2 WHEREFORE having reviewed the demurring papers, opposition, and reply, documents on
3 file with the Court, and having heard oral argument from counsel, the Court rules as follows:

4 IT IS HEREBY ORDERED that Pauley's Demurrer is:

5 1. GRANTED as to cause of action 1, Breach of Contract - Full Performance
6 alleged against Pauley in Adelphia's Second Amended Cross-complaint.

7 2. GRANTED as to cause of action 2, Breach of Contract - Waiver alleged against
8 Pauley in Adelphia's Second Amended Cross-complaint.

9 3. GRANTED as to cause of action 3, Unjust Enrichment alleged against Pauley in
10 Adelphia's Second Amended Cross-complaint.

11 4. GRANTED as to cause of action 4, Implied Equitable Indemnity alleged against
12 Pauley in Adelphia's Second Amended Cross-complaint.

13 5. GRANTED as to cause of action 5, Contribution alleged against Pauley in
14 Adelphia's Second Amended Cross-complaint.

15 6. GRANTED as to cause of action 7, Express Indemnity alleged against Pauley in
16 Adelphia's Second Amended Cross-complaint.

17 IT IS FURTHER ORDERED that the Demurrer is sustained without leave to amend and that
18 all causes of action above against Pauley are hereby dismissed.

19 IT IS SO ORDERED.

20
21 Date: _____

JUDGE PETER BUSCH
HONORABLE JUDGE OF THE SUPERIOR COURT

RECEIVED

APR 17 2007

RYAN & LIFTER

JEFFREY M. VUCINICH, ESQ. BAR#: 67906
JOSHUA W. ROSE, ESQ. BAR#: 191024
CLAPP, MORONEY, BELLAGAMBA and VUCINICH
A PROFESSIONAL CORPORATION
1111 Bayhill Drive, Suite 300
San Bruno, CA 94066
(650) 989-5400 (650) 989-5499 FAX

Attorneys for Defendant/Cross-Complainant/Cross-Defendant
PAULEY CONSTRUCTION, INC.

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

SIFA TUIAKI and LUPE TUIAKI,

Plaintiffs,

v.

PACIFIC GAS AND ELECTRIC
COMPANY, PAULEY
CONSTRUCTION, INC., TRAFFIC
SOLUTIONS, INC., ADELPHIA
TELECOMMUNICATIONS CO., INC.,
SBC TELECOMMUNICATIONS, INC.,
MOBILE TOOL INTERNATIONAL, INC.
dba TELSTA, COUNTY OF
MENDOCINO, STATE OF
CALIFORNIA, PACIFIC BELL
TELEPHONE COMPANY, PACIFIC
TELESIS GROUP, SBC OPERATIONS,
INC., and DOES 1 to 50,

Defendants.

CASE NO.: CGC-03-419761 (Consolidated
with 04-432476)

**PROOF OF SERVICE ON CROSS-
DEFENDANT PAULEY
CONSTRUCTION, INC.'S DEMURRER
TO CROSS-COMPLAINANT
ADELPHIA COMMUNICATIONS
CORPORATION'S SECOND AMENDED
CROSS-COMPLAINT**

Cross-Complaint Filed: 11/2/05
Amended Cross-Complaint Filed: 2/22/07
2nd Amended Cross-Complaint Filed: 4/11/07

Date: May 14, 2007
Time: 9:30 a.m.
Department: 301

SIFA TUIAKI v. PACIFIC GAS AND ELECTRIC COMPANY, et al.

San Francisco Superior Court Case No. CGC-03-419761

PROOF OF SERVICE

I, the undersigned, hereby declare that I am over the age of eighteen years and not a party to the within action. My business address is 1111 Bayhill Drive, Suite 300, San Bruno, CA 94066. On the date indicated below, I served the within:

1. **NOTICE OF HEARING ON DEMURRER OF PAULEY CONSTRUCTION, INC.**

2. **DEMURRER OF CROSS-DEFENDANT PAULEY CONSTRUCTION, INC. TO SECOND AMENDED CROSS-COMPLAINANT BY ADELPHIA COMMUNICATIONS CORPORATION**

3. **MEMORANDUM OF POINTS AND AUTHORITIES OF CROSS-DEFENDANT PAULEY CONSTRUCTION, INC. IN SUPPORT OF DEMURRER TO CROSS-COMPLAINANT ADELPHIA COMMUNICATIONS CORPORATION'S SECOND AMENDED CROSS-COMPLAINT**

4. **PAULEY CONSTRUCTION, INC.'S. REQUEST FOR JUDICIAL NOTICE PURSUANT TO ITS DEMURRER**

5. **[PROPOSED] ORDER GRANTING DEMURRER OF CROSS-DEFENDANT PAULEY CONSTRUCTION, INC. TO CROSS-COMPLAINANT ADELPHIA COMMUNICATIONS CORPORATION'S SECOND AMENDED CROSS-COMPLAINT**

on the parties in this action by transmitting a true copy of the foregoing document(s) in the following manner:



(BY MAIL) Pursuant to Code of Civil Procedure §1013(a), I placed a true copy thereof enclosed in a sealed envelope, addressed as set forth below, and deposited each envelope with postage fully prepaid to be placed for collection and mailing following the ordinary business practices of Clapp, Moroney, Bellagamba & Vucinich. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing of in affidavit.

SEE ATTACHED SERVICE LIST

(BY PERSONAL SERVICE) I caused to be delivered by hand this date each of the above documents, to the following:



(BY FACSIMILE) I caused each of the above documents to be faxed this date to the offices of the following:

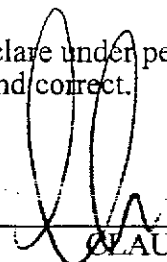


(BY FEDEX) I caused each of the above documents to be sent by FedEx this date to the offices of the following:



(BY LexisNexis FILE & SERVE) I caused to be delivered by LexisNexis File & Serve this date each of the above documents, for which our office will maintain the LexisNexis filing receipt, to the following:

3 Executed on April 16, 2007, at San Bruno, California. I declare under penalty of perjury
4 under the laws of the State of California that the foregoing is true and correct.

5 
6
7 CLAUDIA GOMEZ

TUIAKI v. PACIFIC GAS & ELECTRIC COMPANY, et al.

San Francisco Superior Court Case No.: CGC-04-419761

Our Client: Pauley Construction, Inc.

Our File No.: 0017-03419

SERVICE LIST

Michael J. Daley, Esq. David A. Kleczek, Esq. Ryan & Lifter 2010 Crow Canyon Place, Suite 330 San Ramon, CA 94583 Tel: (925) 884-2080 Fax: (925) 884-2090 <u>Attys for Adelpia Communications</u>	Steven P. Burke, Esq. Matthew C. Lovell, Esq. Peter J. Messrobian, Esq. Sedgwick, Detert, Moran & Arnold One Market Plaza Steuart Tower, 8th Floor San Francisco, CA 94105 Telephone: (415) 781-7900 Facsimile: (415) 781-2635 Attorneys for Defendant Pacific Gas & Electric Company
Robert Ford Rueben Jacobson Lewis Brisbois Bisgaard & Smith LLP One Sansome Street, Suite 1400 San Francisco, CA 94104 Telephone: (415) 362-2580 Facsimile: (415) 434-0882 Attorneys for Defendants SBC WEST/PACIFIC TELESIS GROUP and ADELPHIA TELECOMMUNICATIONS CO., INC.	Steven D. Werth Mark Hazelwood Low, Ball & Lynch 505 Montgomery Street, 7th Floor San Francisco, CA 94111-2584 Telephone: (415) 981-6630 Facsimile: (415) 982-1634 Attorneys for Cross-Defendant S.G. BARBER
Ralph Robinson Peter R. Crane Wilson, Elser, Moskowitz, Edelman & Dicker, LLP 525 Market Street, 17th Floor San Francisco, CA 94105-2725 Tel: (415) 433-0990 Fax: (415) 434-1370 Attorneys for Defendant Mobile Tool International, Inc.	Ray L. Wong, Esq. Duane Morris LLP One Market Street Spear Tower, Suite 2000 San Francisco, CA 94105 Tel: (415) 957-3000 Fax: (415) 957-3001 e-mail: rlwong@duanemorris.com Attorneys for American Premier Underwriters, Inc. and General Cable Corporation

<p>Jorge Franco, Esq. Jennings, Haug & Cunningham LLP 2800 N. Central Avenue, Suite 1800 Phoenix, AZ 85004 Tel: (602) 234-7810 (direct) Cell: (602) 312-0888 Fax: (602) 277-5595 e-mail: jf@ihc-law.com <u>Personal Counsel for Pauley Construction,</u> <u>Inc.</u></p>	
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